No. 13-1360

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Richard G. Tatum, individually
and on behalf of all others similarly situated,
Plaintiff-Appellant,

v.

R.J. Reynolds Tobacco Company, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of North Carolina

BRIEF OF SETH D. HARRIS,
THE ACTING SECRETARY OF LABOR AS AMICUS CURIAE
IN SUPPORT OF PLAINTIFFS-APPELLANTS
AND URGING REVERSAL

M. PATRICIA SMITH
Solicitor of Labor

TIMOTHY D. HAUSER
Associate Solicitor for
Plan Benefits Security

ELIZABETH HOPKINS
Counsel for Appellate
and Special Litigation

STEPHANIE LEWIS
Attorney
U.S. Department of Labor
200 Constitution Ave., N.W., N-4611
Washington, D.C. 20210
(202) 693-5588

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STATEMENT OF INTEREST

The Secretary of Labor is vested with primary regulatory and enforcement authority for Title I of the Employee Retirement Income Security Act of 1974 ("ERISA"), see 29 U.S.C. §§ 1134, 1135, a "comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90 (1983). The statute promotes this interest by, among other things, imposing stringent trust law-derived duties on those who manage the plan and its assets, including the trust law's familiar prudent man standard of care.

This case involves an ERISA-covered pension plan that suffered a loss as a result of a fiduciary's breach of that duty of care in failing to conduct an adequate investigation prior to making a significant investment decision for the plan.
The district court correctly held that the fiduciaries bore the burden of proving that their failure to conduct a prudent investigation when they decided to divest the pension plan of two of its funds did not cause the loss to the Plan. The court erroneously concluded, however, that the fiduciaries met that burden as to loss-causation by showing that a hypothetical prudent fiduciary could have come to the same decision, and were not required to show that such a fiduciary would, more likely than not, have done so. The Acting Secretary has a strong interest in ensuring that the Fourth Circuit, which has not yet ruled on these issues, articulates

the proper standards of proof applicable to such a fiduciary breach case. The Secretary submits this brief pursuant to Federal Rule of Appellate Procedure 29(a).

QUESTIONS PRESENTED

1. Whether the district court properly held that, because plaintiff established a fiduciary breach and a related loss, the fiduciaries had the burden of showing that the loss to the Plan was not a result of the breach.

2. Whether the district court erred in concluding that the fiduciaries met this burden by showing that a prudent fiduciary could have come to the same decision after conducting a thorough investigation.

STATEMENT OF THE CASE

A. Factual Background

Despite a celebrated merger a number of years earlier, in March 1999, RJR Nabisco, Inc., decided to separate its food business, Nabisco (NA), from its tobacco business, R.J. Reynolds Tobacco Company (RJRT), through a spin-off of the tobacco business to shareholders of the holding company, RJR Nabisco Holdings. Tatum v. R.J. Reynolds Tobacco Co., No. 1:02CV000373, --- F. Supp. 2d ---, 2013 WL 692832, at *2 (M.D.N.C. Feb. 25, 2013) ("Tatum trial opinion"). The RJR Tobacco Capital Investment Plan (the "Plan") was created for the employees of the new RJRT on June 14, 1999, the day the spin-off was implemented. Id. at *4. The Plan designated specific investment alternatives, including the Nabisco Common Stock Fund and the Nabisco Group Holdings Common Stock Fund (Nabisco Funds), as well as the RJR Common Stock Fund. As a result of the spin-off, Plan participants who had invested in the RJR Nabisco Plan before the spin-off owned units in both Nabisco Funds and the RJR Fund after the spin-off. Id. at *3. The Plan, however, froze the Nabisco Funds, meaning that participants could maintain but not make any new investments in those funds. Id. at *7.

Nothing in the governing Plan document eliminated the Nabisco Funds or limited the duration in which the Plan would hold the funds, id., and indeed a June 14, 1999 amendment to the Plan expressly required that the Nabisco funds be included in the Plan. See Tatum, 2011 WL 2160893, at *2 (M.D.N.C. June 1, 2011) (quoting section 4.03 of the June Amendment, which provided that the "Trustee shall maintain . . . the Nabisco Common Stock Fund, the Nabisco Group Holdings Common Stock Fund," among others). The Plan also named two committees, the Employee Benefits Committee (EBC) and the Pension Investment Committee (PIC), as plan fiduciaries responsible for general plan administration and plan investments, respectively. See Tatum trial opinion, 2013 WL 692832, at *4. Moreover, the June amendment gave the EBC the power to further amend the Plan so long as it did so by a vote of the majority of its members at any meeting or by an instrument in writing signed by a majority of EBC members. Tatum, 2011 WL 2160893, at *3-*4.

As early as April 1999, however, before any such amendment had taken place, Plan participants began to receive communications notifying them that the Nabisco Funds would eventually be eliminated from the Plan. Tatum trial opinion, 2013 WL 692832, at *4. Then in November 1999, one member, acting as secretary of the EBC, executed a document purporting to be an amendment, which removed the Nabisco Funds from the list of mandated investments in section 4.03 of the Plan. Tatum, 2011 WL 2160893, at *4. Because this amendment was not voted on or signed by a majority of EBC members, the court held that it was invalid. Id. at *10.

Because the value of the Nabisco Funds had declined significantly after the spin-off, plaintiff Richard Tatum asked members of the Employee Benefits Committee (EBC) not to force the sale of Nabisco Funds, which would result in the recognition of a 60% loss to his 401(k) account. Tatum trial opinion, 2013 WL 692832, at *16. Members of the EBC rebuffed his requests and divested the Plan of its Nabisco stock holdings. Id. at *16-17. Within a few months of the sale of the units in and the termination of the Nabisco Funds, and after investor Carl Icahn renewed his attempts to take over Nabisco, the value of Nabisco's stock began to appreciate significantly. Id. at *15.

Tatum brought a class action suit in May 2002, naming as defendants the company itself and various related corporate entities, as well as the EBC and the PIC, and alleging that "RJR breached its fiduciary duties by eliminating the Nabisco stock from the Plan without the thorough investigation or analysis required by ERISA, thereby causing losses to the Plan." Tatum trial opinion, 2013 WL 692832, at *18. Tatum's complaint was initially dismissed on grounds that Tatum's allegations concerned "settlor" rather than "fiduciary" actions. See Tatum, 294 F. Supp. 2d 776, 784 (M.D.N.C. 2003)). The Fourth Circuit reversed, holding that applicable Plan amendments, which removed the Nabisco Funds from the list of required options, did not mandate removal of the Nabisco Funds or the sale of the Nabisco stock and thus did not preclude Tatum from stating a claim that divesting the Nabisco stock from the Plan was a fiduciary act. Tatum, 392 F.3d 636, 640 (4th Cir. 2004).[1] In 2007, the district court dismissed EBC and PIC as defendants in the case. Tatum, 2007 WL 1612580 (M.D.N.C. May 31, 2007).[2] A class of over 3,500 employees and retirees was certified in September 2008. See

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[1] In 2004, the Department submitted an amicus brief in support of appellant that requested reversal of the district court's dismissal. The brief argued that while amending a plan is a settlor act, the fiduciaries were nevertheless required to consider the prudence of selling the stock. See http://www.dol.gov/sol/media/briefs/tatum%28A%29-5-7-2004.pdf.

[2] The plaintiffs have appealed this dismissal. However, the Acting Secretary is not addressing this issue in his amicus brief or a number of other more fact-bound issues raised by the plaintiffs on appeal.

Tatum trial opinion, 2013 WL 692832, at *1, *18-*19. A bench trial was held from January 13, 2010 to February 9, 2010. Id. at *19.

B. Decisions Below

On February 25, 2013, the district court issued a decision on the merits. The court decided that, although the company, as fiduciary, acted imprudently in eliminating the Nabisco Funds without a thorough investigation of the merits of doing so, it met its burden of showing that it could have prudently decided to eliminate the Funds if it had conducted a proper investigation. For that reason, the court held that this fiduciary breach did not cause any loss to the Plan.

The district court first determined that "ERISA's prudence standard requires that a plan investment decision, including the decision to keep or eliminate a plan investment option, be made only after a thorough and impartial investigation and analysis." Tatum trial opinion, 2013 WL 692832, at *23 (citing DiFelice v. U.S. Airways, Inc. 497 F.3d 410, 420 (4th Cir. 2007)). Based on the evidence presented at trial, including evidence from the plaintiffs' expert, the court found "[t]he process used by the decision-makers in this case fell far below what ERISA would require of the fiduciary." Id. at *26. First, the court found that the working group set up by the company to address implementation of the spin-off discussed the elimination of the Nabisco Funds for only about one hour. Id. It further found that the members of this group failed to consider alternative viewpoints, raise questions, and engage in additional research to confirm the reasonableness of their assumptions. Id. Moreover, the district court noted the lack of evidence that the company had a process for investigating or analyzing whether it was appropriate to divest Nabisco stock, and the failure to examine other options or seek legal opinions or advice. Id. at *27. Indeed, the main rationale for removing the Nabisco Funds – that the Plan would lose its exemption from the ERISA diversification requirement for employer stock and therefore be per se imprudent if it held on to that stock – was incorrect. Id. There was, in short, simply a "lack of effort on the part of those considering the removal of the Nabisco Funds" to adequately examine the decision or alternatives. Id. at *30. Accordingly, relying on this evidence as well as the testimony of plaintiff's expert, the court concluded that "the RJR decision-makers in this case failed to exercise prudence in coming to their decision to eliminate the Nabisco Funds from the Plan." Id.

Nevertheless, the court reasoned that "[a] finding that RJR breached the duty of procedural prudence by failing to engage in a proper investigation does not end the inquiry into whether [plaintiffs] should ultimately prevail on their claim," because "the Fourth Circuit has affirmatively found that, 'while certain conduct may be a breach of an ERISA fiduciary's duties under [29 U.S.C.] § 1104, that fiduciary can only be held liable upon a finding that the breach actually caused a loss to the plan.'" Tatum trial opinion, 2013 WL 692832, at *30 (quoting

Plasterers' Local Union No. 96 Pension Plan v. Pepper, 663 F.3d 210, 217 (4th Cir. 2011)). "Even if a trustee failed to conduct an investigation before making a decision, he is insulated from liability [under 29 U.S.C. § 1109(a)] if a hypothetical prudent fiduciary would have made the same decision anyway.'" Id. (quoting Plasterer's, 663 F.3d at 218) (emphasis added).

Reasoning, however, that there may be more than one prudent option available to a fiduciary, the district court then determined that "once Tatum made a showing that there was a breach of fiduciary duty and some sort of loss to the plan, RJR assumed the burden (that is, the burden of production and persuasion) to show" that the decision was "reasonable under the circumstances" and thus objectively prudent. Tatum trial opinion, 2013 WL 692832, at *30-31. The court consequently held that, although Tatum presented evidence that it might have been prudent to maintain the frozen stock fund, id. at 32, the fiduciaries' failure to investigate "was not the cause of any of Tatum's or the class's alleged injuries," because "a hypothetical prudent fiduciary could have decided not to add or maintain the Nabisco Funds as either frozen or active funds in the Plan on January 31, 2000." Id. at *36 (emphasis added). It based its conclusion that RJR had met its burden on a number of factors, including the risk of holding not just one but three single stock funds in the Plan, as well as the risk of the ongoing taint of tobacco litigation and the potential bankruptcy of RJR. Id. at *32-*33. In addition, the court observed that the analyst reports in 1999-2000, many of which made favorable predictions about Nabisco's future prospects, did not compel a decision to maintain the Nabisco Funds in the Plan. Id. at *33. And while a hypothetical prudent fiduciary would have been aware of Carl Icahn's history with and interest in RJR, in the court's view, "that simply does not translate to a conclusion that he or she would have maintained the Nabisco Funds after January 31, 2000, expecting considerable appreciation. Holding onto a stock on the basis that a takeover might be coming, in some unknown form, regardless of what evidence might exist, is speculative." Id. at *36. Finally, the court found Tatum's evidence that seven companies out of a universe of nearly ten thousand plans had maintained frozen stock funds in their plans "not probative on the issue of prudence." Id.

SUMMARY OF THE ARGUMENT

Under ERISA section 409(a), 29 U.S.C. § 1109(a), a fiduciary is personally liable for losses resulting from a breach of its duties. ERISA does not, however, expressly state who bears the burden of proving that the breach caused the loss or the applicable standard for meeting this burden.

The district court correctly concluded that once plan participants or other ERISA plaintiffs have shown that plan fiduciaries breached their ERISA duties and that the plan suffered a related loss, those fiduciaries have the burden of proving that their breaches did not cause the loss to the plan. Trust law places on the fiduciary the burden of showing that the loss would have occurred notwithstanding the breach and, thus, the district court's approach is consistent with the intent and purpose of the high trust law-derived standard of care ERISA imposes on plan fiduciaries. See Donovan v. Bierwirth, 680 F.2d 263, 272 n.8 (2d Cir. 1982) ("The fiduciary obligations … to the participants and beneficiaries of the [ERISA] plan are …the highest known to the law. ").

The district court, however, used an incorrect standard for determining whether the breaching fiduciaries made such a showing. As discussed in Section II, it is not sufficient to show that a hypothetical prudent fiduciary could prudently have decided to eliminate the Nabisco Funds on January 31, 2000. This standard is inconsistent with the adoption by this Court as well as other Circuits of a hypothetical prudent fiduciary standard, under which the reviewing court must determine under a preponderance of the evidence standard what a prudent fiduciary would have done under the circumstances. By concluding that RJR met its burden by showing that a hypothetical prudent fiduciary could have made the same decision, the district court's decision set too low a bar for breaching fiduciaries and threatens to weaken ERISA's deterrent effect against such breaches of fiduciary duties. Instead, where a fiduciary failed to conduct an adequate investigation into the prudence of the relevant investment decision and a loss to the plan occurred, the fiduciary must show that, had it conducted such an investigation, it is more likely than not that it would have made the same decision and the plan would have suffered the same loss.

ARGUMENT

I. BECAUSE TATUM PROVED THAT RJR BREACHED ITS FIDUCIARY DUTIES UNDER ERISA BY FAILING TO INVESTIGATE THE MERITS OF DIVESTING THE PLAN OF NABISCO STOCK HOLDINGS AND THE PLAN SUFFERED A RELATED LOSS, THE DISTRICT COURT CORRECTLY HELD THAT RJR BORE THE BURDEN OF SHOWING THAT THE PLAN NEVERTHELESS WOULD HAVE SUFFERED THE SAME LOSS EVEN HAD IT ENGAGED IN A PRUDENT PROCESS

ERISA section 404 imposes a number of duties on those acting as fiduciaries to ERISA-governed employee benefit plans, including the familiar trust law-derived duties of prudence and loyalty. 29 U.S.C. ERISA § 1104. "In general, Congress intended ERISA's fiduciary responsibility provisions to be a codification of the common law of trusts . . . and the duties of care and integrity demanded of a fiduciary were among the highest, if not the very highest, known to the common law." Edmonds v. Hughes Aircraft Co., 145 F.3d 1324 (Table), 1998 WL 228200, at *8 (4th Cir. 1998) (per curiam). To this end, section 409(a) of ERISA provides that if a fiduciary breaches its duties under ERISA, it is personally liable for losses resulting from each breach. 29 U.S.C. § 1109(a). The text of ERISA does not, however, state who bears the burden of proving that the breach actually caused the loss.

In the Secretary's view, the district court correctly concluded that, as a fiduciary that breached its duty of care under ERISA by failing to engage in a prudent investigation into the merits of divesting the Nabisco stock in late 1999 and early 2000, RJR bore the burden of proving that its failure to adequately investigate its decision did not cause the Plan's loss. Tatum trial opinion, 2013 WL 692832 at *31. This Court should affirm this holding because it is firmly grounded in the common law of trusts, furthers the objectives of ERISA, and is supported by the better reasoned case law.

Under the default rule generally applicable where the statute is silent, the burden of proof rests with the plaintiff. Schaffer ex rel. Schaffer v. Weast, 546 U.S. 49, 56 (2005) (regarding the burden of proof in an administrative hearing challenging an individualized education program). The Supreme Court has recognized, however, that the default rule should not and does not apply in every circumstance. Id. at 57. ("The ordinary default rule, of course, admits of exceptions."). The Fourth Circuit also has acknowledged the limitations of the ordinary default rule: "Although the natural tendency is to place the burden [ ] on the party desiring change" or seeking relief, other factors such as policy considerations, convenience, and fairness may allow for a different allocation of the burden of proof." Weast v. Schaffer ex rel. Schaffer, 377 F.3d 449, 455 (4th Cir. 2005) (quoting McCormick on Evidence § 337, aff'd, 546 U.S. 49 (2005).

How this rule applies in the ERISA context is still an open issue in the Fourth Circuit, as this Court acknowledged recently in Plasterers', 663 F.3d at 220. Plasterers' involved an action brought by current trustees alleging that former plan fiduciaries breached their fiduciary duty under ERISA to investigate investment options. Id. at 212-213. The district court concluded that these fiduciaries failed to investigate and diversify plan investments and assessed damages against the former fiduciaries based on expert testimony about what a prudent investment would have earned during that period. Id. at 216. On appeal, however, the Fourth Circuit held that it was not enough for the district court to find a breach of the duty to investigate in order to assess damages under section 409(a). The district court also had to determine if the former trustees' failure to investigate resulted in them making imprudent investments, thus causing a loss to the plan. Id. at 217-218. ("Because the court never found that the failure to investigate investment options led to imprudent investments or otherwise found that the investments were objectively imprudent, its analysis lacked the essential element of causation."). Id. at 219. This Court expressly left open, however, the question of which party bears the burden of proving "that the loss resulted from the breach" once the plaintiff has made a "prima facie showing that there was a breach of fiduciary duty and there was some sort of loss to the Plan." Id. at 219-220. Pointing out what it viewed as a split among the circuit courts, this Court left it "to the district court … to determine the method most consistent with the relevant statutory provisions." Id. at 220 (citations omitted).

Although this Court has not ruled on which party bears the burden of proving loss causation in cases involving an ERISA fiduciary's duty to investigate, it has adopted the rule we advocate in an analogous fiduciary context. In Brink v. DaLesio, 667 F.2d 420, 426 (4th Cir. 1982), the Court considered the burden of proof in a case involving union officials who had violated fiduciary standards under the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 501 (LMRDA), by engaging in self-dealing in the rental of office space. It ruled that the district court erred in placing the burden on the plaintiffs to prove the damages to the union: "It is generally recognized that one who acts in violation of his fiduciary duty bears the burden of showing that he acted fairly and reasonably." Id.; see New York State Teamsters Council Health and Hospital Fund v. Estate of DePerno, 18 F.3d 179, 182-83 (2d Cir. 1994) (quoting Brink with approval and applying same rule).

This same principle fully supports placing the burden of showing that the breach did not cause the loss on breaching fiduciaries who, as here, make plan investment decisions without adequate investigation. ERISA, after all, is a remedial statute expressly designed to safeguard the "financial soundness" of employee benefit plans by imposing, among other duties and obligations, the highest trust law-derived standard of care on those who manage the assets of employee benefit plans. 29 U.S.C. § 1001(a), (b). And because it "abounds with the language and terminology of trust law," the Supreme Court has drawn on trust law principles in determining the appropriate standard of review applicable to fiduciary benefit decisions. See Firestone Tire & Rubber v. Bruch, 489 U.S. 101, 101-11 (1989). Just as the trust law supports imposing the burden on breaching union officials to prove that the union was not harmed by their self-dealing, trust law likewise supports imposing on an ERISA fiduciary who has been shown to have breached his duties the burden of showing that the breach did not result in any harm to the plan or its participants and beneficiaries. See George Gleason Bogert and George Taylor Bogert, The Law of Trusts and Trustees § 871, p. 156 (2d rev. ed. 1995 & Supp. 2012) (once "the beneficiary makes a prima facie case, the burden of contradicting it or showing a defense will shift to the trustee"). Under trust law "as between an innocent beneficiary and a defaulting fiduciary, the fiduciary must bear the risk of uncertainty as a consequence of his breach of fiduciary duty." Estate v. Stetson, 345 A.2d 679, 690 (Pa. 1975) ("[W]hen a beneficiary has succeeded in proving that the trustee has committed a breach of duty and that a related loss has occurred, we believe that the burden of persuasion ought to shift to the trustee to prove, as a matter of defense, that the loss would have occurred in the absence of a breach of duty.")

The Supreme Court and many other courts have long applied this trust law principle in fiduciary cases in general. See, e.g., Geddes v. Anaconda Copper Mining Company, 254 U.S. 590, 599 (1921) (corporate fiduciary case holding that where a sale between corporate board members is challenged, burden is on members to show the fairness of the sale and adequacy of the consideration); Nedd v. United Mine Workers of Am., 556 F.2d 190, 210 (3d Cir. 1977) (under the "'law of trusts . . . once the beneficiaries have established their prima facie case by demonstrating the trustees' breach of fiduciary duty, the burden of explanation or justification . . . shifts to the fiduciaries'"). More generally, this principle is consistent with the longstanding rule that any uncertainties in measuring the damages caused by a fiduciary breach under ERISA are resolved against the breaching fiduciaries. See Leigh v. Engle, 727 F.2d 113, 138 (7th Cir. 1984); Donovan v. Bierwirth, 754 F.2d 1049, 1057 (2d Cir. 1985); Kim v. Fujikawa, 871 F.2d 1427, 1430-31 (9th Cir. 1989); Secretary of Labor v. Gilley, 290 F.3d 827, 830 (6th Cir. 2002).

Moreover, the approach we advocate here is supported by the decisions of a number of other circuits, which have long and correctly held that the burden shifts to the fiduciaries to prove that their breach did not cause the loss, once the plaintiff establishes a fiduciary breach and a prima facie case of related loss to an ERISA plan. Two cases from the Eighth Circuit first established this principle. See

Martin v. Feilen, 965 F.2d 660, 671 (8th Cir.1992) (the plaintiff has the burden to prove "a fiduciary breach and a prima facie case of loss to the plan," at which point "the burden of persuasion shifts to the fiduciary to prove that the loss was not caused by . . . the breach of duty"); Roth v. Sawyer-Cleator Lumber Co., 16 F.3d 915, 917 (8th Cir. 1994) (same). The Fifth Circuit adopted this framework shortly thereafter. McDonald v. Provident Indem. Life Ins. Co., 60 F.3d 234, 237 (5th Cir.1995); see Estate of DePerno, 18 F.3d at 182 (ERISA case holding that although the general rule is that the "plaintiff bears the burden of proving the fact of damages," once the plaintiff has established a fiduciary breach and a prima facie case of loss, the burden shifts to the fiduciary).[3]

At least one circuit has held to the contrary in a published opinion.[4] In Silverman v. Mutual Benefit Life Ins. Co., 138 F.3d 98 (2d Cir. 1998), an

[3] Whatever the nomenclature used in these various decisions – substantive prudence, loss causation, damages – the issue is essentially the same: whether it is the breaching fiduciary that must bear the burden of proving that its breach did not cause the associated loss to the plan in order to bar a recovery of losses under ERISA section 409(a).

[4] The Sixth and Eleventh Circuits have also noted in passing that a plaintiff must "demonstrate that an adequate investigation would have revealed to a reasonable fiduciary that the investment at issue was improvident." Kuper v. Iovenko, 66 F.3d 1447, 1459-60 (6th Cir. 1995); see also Willett v. Blue Cross of Ala., 953 F.2d 1335, 1343-44 (11th Cir. 1992) (stating that "the burden of proof on the issue of causation will rest on the beneficiaries; they must establish that their claimed losses were proximately caused either by a failure by Blue Cross to cure Mays' breach or knowing participation by Blue Cross in Mays' breach"). But neither of these courts was actually resolving the question of whether the burden shifts to the

independent fiduciary sought to hold co-fiduciaries liable for embezzlement of funds by other former fiduciaries. The Secretary submitted an amicus brief urging the Second Circuit to hold that "once a plaintiff has shown a breach of [29 U.S.C. 1105(a)(3)] and a related loss," the burden of proof on the issue of causation rested with the defendant, but the court concluded, to the contrary, that in order to hold the co-fiduciaries liable for damages under ERISA, plaintiffs must prove that it was the fiduciaries' breaches that caused the plan losses. Id. at 105-06 (Jacobs & Meskill, JJ., concurring). In so holding, the concurring judges explained that they were expressly departing from the trust law rule "under which a defaulting fiduciary bears the burden of disproving causation," based on the language of ERISA section 409, which allows for the recovery of plan losses only to the extent that they "result from" the fiduciary breaches. Id. at 106.

But properly understood, the argument rejected by the Second Circuit in Silverman differs somewhat from the argument the Acting Secretary is making here (and that was adopted by the Fifth Circuit in McDonald). Unlike in Silverman, where the plaintiff did not assert any nexus between the plan's loss of money to the embezzlers and the failure of the fiduciaries to act (at a time when the embezzlers may or may not have had the money), the plaintiffs here showed both a breach, based on the fiduciaries' failure to investigate the merits of the decision to

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fiduciaries once the plaintiff has established a breach and made a prima facie showing of a resulted loss.

divest the stock, and a prima facie case of loss, based on the fact that the plan indisputably would have been better off had the stock not been sold at that time. Consequently, the three-part framework of McDonald and Roth that the Acting Secretary urges this Court to adopt – under which the ERISA plaintiff bears the burden of showing a fiduciary breach and a prima facie case of a related loss with a shift of the burden to the breaching fiduciary to show that the loss would have occurred in any event – does not conflict with the Second Circuit's rejection in Silverman of burden shifting in the absence of any showing of related loss. See Silverman, 138 F.3d at 106 n.1 (Jacobs & Meskill, JJ., concurring) (distinguishing Martin v. Feilen as involving "the *calculation of damages* after the plaintiff proved a prima facie case that the plan suffered a loss resulting from the defendant's breach of its fiduciary duty").

The approach advocated here is most consistent with the structure and purposes of ERISA. As this Court recognized in Plasterers', ERISA's primary objective is to ensure that plan assets are prudently managed for the benefit of plan participants and their beneficiaries. The statute does this in large part through its fiduciary provisions and accompanying remedies, which were designed to serve as a deterrent to imprudent or other harmful conduct. Plasterers', 663 F.3d at 217-18 (quoting Brock v. Robbins, 830 F.2d 640, 647 (7th Cir. 1987)). Imposing on plaintiffs who have established a fiduciary breach and a prima facie case of loss the burden of showing that the loss would not have occurred in the absence of a breach would create significant barriers for those (including the Secretary) who seek relief for fiduciary breaches, and provide an unfair advantage to a defendant who has already been shown to have engaged in wrongful conduct, minimizing the fiduciary provisions' deterrent effect. See Chao v. Trust Fund Advisors, 2004 WL 444029, *6 (D. D.C. Jan. 20, 2004) (quoting Secretary of Labor's brief and concluding that she made "a persuasive argument in support of burden-shifting, arguing that those circuit courts that have chosen to place the entire burden on the plaintiff have failed to 'conform with ERISA, a statute founded on the common law of trusts… [under which] the fiduciary must bear the risk of uncertainty as a consequence of his breach of fiduciary duty'"). As the district court here properly recognized, shifting the burden to breaching fiduciaries to show that the loss would have occurred in any event "is most fair considering that a causation analysis would only follow a finding of breach." Tatum trial opinion, 2013 WL 692832, at *30.

II. TO CARRY ITS BURDEN OF SHOWING THAT THE PLAN WOULD HAVE SUFFERED THE SAME LOSS ABSENT THE BREACH, RJR MUST SHOW, BY A PREPONDERANCE OF THE EVIDENCE, THAT A PRUDENT FIDUCIARY WOULD HAVE COME TO THE SAME DECISION TO DIVEST THE NABISCO STOCK AT THAT TIME AND IN THAT MANNER HAD IT ENGAGED IN A THOROUGH AND INDEPENDENT INVESTIGATION OF THE MERITS OF DOING SO

Although the district court properly shifted the burden to defendants, the court erred in concluding that RJR satisfied this burden through a showing that a fiduciary that had engaged in a prudent evaluation process could have decided to divest the Nabisco stock during the period in question, particularly where, as here, the plan itself required the Plan to offer the Nabisco Funds.

The Fourth Circuit, as we have noted, has not resolved which party has the burden of proof on the issue. But it has approved the use of the hypothetical prudent fiduciary standard to evaluate if a fiduciary's breach caused the asserted loss. Under such a standard, "' [e]ven if a trustee failed to conduct an investigation before making a decision, he is insulated from liability [under section 409(a)] if a hypothetical prudent fiduciary would have made the same decision anyway. '" Plasterers', 663 F.3d at 218 (quoting Roth, 16 F.3d at 919) (emphasis added). Other circuits that have looked at the issue have articulated the same standard. See Bussian v. RJR Nabisco, Inc., 223 F.3d 286 (5th Cir. 2000) (even if the fiduciary did not conduct an adequate investigation in picking a service provider, "ERISA's obligations are nonetheless satisfied if the provider selected would have been chosen had the fiduciary conducted a proper investigation"); Renfro v. Unisys Corporation, 671 F.3d 314, 322 (3d Cir. 2011) (approving the hypothetical prudent fiduciary test as set forth in Roth, 16 F.3d at 919). But see Chao v. Hall Holding Co., Inc., 285 F.3d 415, 436 (6th Cir. 2002) (rejecting use of hypothetical prudent fiduciary standard in a prohibited transaction case and concluding that, regardless of the price that a hypothetical prudent fiduciary would pay for employer stock, the plan's purchase of the stock from the sponsoring company was prohibited if the fiduciary failed to conduct a reasonable investigation).

After first articulating the correct Fourth Circuit standard as set forth in Plasterers', however, the district court applied a substantively different standard when it concluded that RJR was not liable for losses because a hypothetical prudent fiduciary could have decided to eliminate the Nabisco Funds on January 31, 2000. The district court erred in this regard. Where the participant has proved a breach of fiduciary duty and a related loss, to avoid financial liability the defendant must prove that if it had acted prudently it would, more likely than not, have come to the same decision and the plan would have suffered the same loss.

Defendants argued below that measuring a fiduciary's act against a zone of reasonable conduct (i.e., the "could" standard) properly reflects the "more likely than not" standard of proof that applies to ERISA actions for breach of fiduciary duty because it is often the case that prudence encompasses a range of conduct. Defendant's Post-Trial Proposed Findings of Fact and Conclusions of Law, 211, Feb. 4, 2011. While it is true that several prudent courses of action are often available to a fiduciary, it is irrelevant to the issue at hand because here the breach has already been established based on RJR's failure to engage in a prudent process for evaluating the decision in 1999 to divest the Plan of Nabisco stock. Thus, the only question in this case involves a prediction about what would have happened if the investigation had been conducted in a prudent manner. "[W]hen there is uncertainty about the answer, the word 'would' is best read as 'express[ing] concepts such as custom, habit, natural disposition, or probability.'" Knight v. Commissioner of Internal Revenue, 552 U.S. 181, 192 (2008) (citations omitted).

In other words, determining if the fiduciary is liable for its breach entails an inquiry into the likely, probable, or customary consequence of a prudent investigation. In this case, that means resolving whether a prudent fiduciary after conducting a thorough inquiry into the matter more likely than not would have eliminated the Nabisco Funds under the circumstances that existed at the time of the actual decision. The "could" standard applied by the district court, on the other hand, encompasses a much broader range of possibilities from the most to the least probable consequence of a prudent investigation, the least probable likely being the least protective of participants' benefits. It thereby creates too low a bar, allowing breaching fiduciaries to avoid financial liability based even on remote possibilities. Courts, however, should not and "do not take kindly to arguments by fiduciaries who have breached their obligations that if they had not done this, everything would have been the same," Beck Industries, Inc. v. Kirschenbaum, 605 F.2d 624, 636-637 (2d Cir. 1979), and indeed generally "should resolve doubts" about damages "in favor of the plaintiffs." Kim, 871 F.2d at 1430-1431 (quoting Leigh v. Engle, 727 F.2d 113, 138-139 (7th Cir. 1984)).

Moreover, in this case, the Plan terms themselves mandated the inclusion of the Nabisco Funds as investment alternatives for the Plan. Tatum trial opinion, 2013 WL 692832, at *7 (citing Section 4.04 (b) and (c), R.J. Reynolds Tobacco Company Capital Investment Plan (Third Restatement June 14, 1999)). While plan fiduciaries can and must depart from plan terms where it would be imprudent or otherwise would violate ERISA to follow them, they must in all other cases follow those terms. 29 U.S.C. § 1104(a)(1)(D) (under heading "Prudent Man Standard of Care," requiring plan fiduciaries to act "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title and title IV"). See Dardaganis v. Grace Capital, Inc., 889 F.2d 1237, 1242 (2d Cir. 1989) (although this Court concluded that investment decisions made by the plan fiduciaries were prudent, it held that the fiduciaries had not shown that it would have been imprudent to comply with the governing plan document). While Tatum may well have waived this argument by stipulating that he would not assert a violation of 29 U.S.C. § 1104(a)(1)(D), Transcript of Record at 96-97, to the extent he has not, the requirement in the Plan documents that the Funds be offered is certainly relevant if not dispositive. Unless the Funds were imprudent, the plan fiduciaries would have had no choice but to follow the terms of governing plan documents, and the district court, therefore, would have had no basis for finding that the breach did not cause a loss.

To be clear, it is possible that the district court could conclude on the record presented that a prudent fiduciary would, more likely than not, have considered itself obligated to eliminate the two Nabisco Funds in late 1999/early 2000, regardless of Plan terms to the contrary. As this Court has correctly noted, single stock funds carry significant risks. DiFelice, 497 F.3d at 424 ("placing retirement funds in any single stock fund carries significant risk and so would seem generally imprudent for ERISA purposes"). RJR submitted a great deal of evidence that the district court detailed at length in its decision that might support a finding that a prudent fiduciary would have concluded that maintaining the Nabisco Funds in late 1999 was imprudent, including the substantial decline in the share price after the spin-off, the uncertain outlook for Nabisco and, perhaps most importantly, the high risk inherent in the two single stock Nabisco Funds, compounded by the fact that the Plan also contained a third single stock fund containing stock in RJR. For these reasons, a prudent fiduciary likely would, at a minimum, have been skeptical about maintaining the Nabisco Funds indefinitely, a skepticism that the Secretary shares (although this would not necessarily support the timing of the divestment decision). But regardless of the resolution of this issue, it is important that this

Court hold breaching fiduciaries to the task of showing that the same loss to a plan would have occurred even if they had met their duties under ERISA.

CONCLUSION

For the reasons stated above, the district court's decision should be reversed.

Respectfully Submitted,

M. PATRICIA SMITH
Solicitor of Labor

TIMOTHY D. HAUSER
Associate Solicitor
Plan Benefits Security Division

ELIZABETH HOPKINS
Counsel for Appellate and
Special Litigation
Plan Benefits Security Division

/s/ Stephanie Lewis
STEPHANIE LEWIS
Attorney
Plan Benefits Security Division
U.S. Department of Labor
Room N-4611
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-5588 – Phone
(202) 693-5610 – Fax

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Dated: June 25, 2013

s/ Stephanie Lewis
STEPHANIE LEWIS

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I certify that the digital version and hard copies of the Secretary's Brief are identical. I further certify that a virus scan was performed on the Brief using McAfee, and that no viruses were detected.

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STEPHANIE LEWIS

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I hereby certify that on June 25, 2013, a copy of the foregoing was filed electronically using the CM/ECF system, which will send notification of such filing to the following:

Adam Howard Charnes
Kilpatrick Townsend & Stockton
1001 W. Fourth Street
Winston-Salem, NC 27101

Kelly M. Dermody
Lieff, Cabraser, Heimann & Bernstein, LLP
Embarcadero Center West
275 Battery Street, 30th Floor
San Francisco, CA 94111-3339

Richard Donald Dietz
Kilpatrick Townsend & Stockton
1001 W. Fourth Street
Winston-Salem, NC 27101

Robert Mauldin Elliot
Elliot Pishko Morgan, P.A.
429 Old Salem Rd.
Winston-Salem, NC 27101

Chad Dwight Hansen
Kilpatrick Townsend & Stockton
1001 W. Fourth Street
Winston-Salem, NC 27101

Daniel Morris Hutchinson
Lieff, Cabraser, Heimann & Bernstein, LLP
Embarcadero Center West
275 Battery Street, 30th Floor
San Francisco, CA 94111-3339

Jeffrey G. Lewis
Lewis Feinberg Lee Renaker & Jackson, P.C.
476 – 9th Street
Oakland, CA 94607

Helen Parsonage
Elliot Pishko Morgan, P.A.
429 Old Salem Rd.
Winston-Salem, NC 27101

Daniel R. Taylor, Jr.
Kilpatrick Townsend & Stockton
1001 W. Fourth Street
Winston-Salem, NC 27101

Thurston Holderness Webb
Kilpatrick Townsend & Stockton
1001 W. Fourth Street
Winston-Salem, NC 27101

Catha Worthman
Lewis Feinberg Lee Renaker & Jackson, P.C.
476 – 9th Street
Oakland, CA 94607

I further certify that on June 26, 2013, eight hard copies of the foregoing Brief were sent to the Clerk's office using U.P.S, postage paid.

s/ Stephanie Lewis
STEPHANIE LEWIS